

THE HONORABLE JUDGE JOHN CHUN
NOTED FOR FRIDAY JUNE 24, 2022
ORAL ARGUMENT REQUESTED

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

I. RESPONSE TO DEFENDANT'S MOTION TO DISMISS

The Plaintiff in this case (“Mr. Wondie”) respectfully opposes King County’s (“Defendant”) Motion to Dismiss his *Monell* claim. In the alternative, he requests that if the Court dismisses the *Monell* claim, the dismissal is without prejudice and with leave to amend the Complaint as appropriate.

II. STATEMENT OF FACTS

A. Mr. Wondie filed a Monell claim against Defendant.

26 Mr. Wondie filed his Complaint on December 3, 2021. *Dkt 1.* His Complaint
27 alleges civil rights violations pursuant to 28 U.S.C. § 1983 against retired King

1 County Sheriff Detective Kathleen Decker, terminated King County Sheriff
2 Deputy George Alvarez, and King County.¹ In his Complaint, Mr. Wondie alleges:
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4 5.5 Plaintiff was injured by the unconstitutional policies, customs
5 and procedures implemented and followed by the King County Sheriff's
6 Department in violation of his civil rights as provided by the 4th, 8th and 14th
7 Amendments to the Constitution of the United States and King County is liable
8 under 42 U.S.C. § 1983 and§ 1988.

9 5.6 Defendants King County and King County Sheriff's Department
10 knowingly, recklessly, or with deliberate indifference and callous disregard of
11 Plaintiffs rights, failed to instruct, supervise, train, control and/or discipline on
12 a continuing basis Defendant officers and other officers in their duty.

13 5.7 Defendants King County and King County Sheriff's Department
14 had power to prevent the commission of the aforesaid wrongs, could have
15 done so by reasonable diligence, but failed to do so with deliberate indifference
16 and callous disregard of the rights of Plaintiff.

17 5.8 As a direct and proximate cause of defendants' violation of
18 Plaintiffs rights, Plaintiff has suffered economic and emotional damages in
19 amounts to be proven at trial.

20 In his Complaint, Mr. Wondie also alleges:

21 4.6 At some point while the firearm was in SPD's possession, a law
22 enforcement officer test fired the weapon. A casing was taken from the test firing
23 and the results were entered into the National Integrated Ballistic Integration
24 Network ("NIBIN") which is maintained by the Bureau of Alcohol, Tobacco,
25 Firearms and Explosives ("ATF") NIBIN queries can provide law enforcement
officers with linkages to shots-fired incidents. Law enforcement can submit a
shell casing to NIBIN to see if it matches the result of any other other shell casing
in the system. If done properly, it is possible to determine if the shell casing found
at a crime scene matches a particular gun.

26 4.7 Detective Decker found a shell casing at the scene of the Amarah
27 Riley homicide and submitted the casing to the Washington State Patrol Crime
Lab ("WSP Lab"). The casing was run through a NIBIN computer. Detective
Decker received an email indicating the shells from the murder scene appeared to
correspond with a shell fired from the gun belonging to Mr. Wondie when it was

1 The § 1983 claim against King County is also known as a *Monell* claim, *Monell v.*
2 *Department of Soc. Servs.*, 436 U.S. 658, 690, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

1 in SPD's possession. Based on this information, her investigation turned to Mr.
2 Wondie.

3 4.8 Under forensic protocols that existed when Detective Decker
4 applied for the warrant, WSP must perform a microscopic confirmation of any
5 casings before NIBIN results can be used for warrants, arrests, or at trial, and a
6 formal report must be requested.

7 4.9 Prior to applying for the search warrant, Detective Decker had
8 been provided with information that "NIBIN is a screening tool. What you need
9 is to have the lead confirmed by the WSP Crime Lab." Detective Decker testified
10 that she knew that she needed to submit her NIBIN lead to the WSP Lab for
11 verification to use the evidence, but indicated she thought that requirement only
12 applied to cases going to trial. A lead resulting from a NIBIM query is
13 distinguishable from confirmation that a shell casing is related to particular
14 firearm. Detective Decker never sought confirmation that the shell casing she
15 submitted was related to a gun previously owned by Mr. Wondie. This is
16 problematic because NIBIN queries can result in false positive results and further
17 forensic work is necessary to eliminate the potential for a false positive. Hence,
18 to use an NIBIN lead as evidence, additional microscopic testing must be
19 performed by the WSP crime lab. Detective Decker disregarded this protocol.

20 4.10 In her affidavit supporting the search warrant, Detective Decker
21 testified that "the test results link conclusively the shell casings collected from the
22 Amarah Riley murder scene on September 19, 2018 and the Gizachew Wondie
23 Smith and Wesson .40 caliber firearm described above." Detective Decker also
24 testified in her affidavit that "Forensic examination has established that shell
25 casings recovered from the scene matched a gun known to be owned by Gizachew
26 Wondie." At the motion hearing, Detective Decker acknowledged this statement
27 was incorrect. It is undisputable that Detective Decker misrepresented the
28 evidentiary value of NIBIN query in her affidavit and used it inappropriately. This
29 was the primary evidence Detective Decker used to link Mr. Wondie to the gun
30 she believed was associated with Ms. Riley's murder.

31 4.11 Detective Decker believed that an individual that employed Ms.
32 Riley may have been involved in Ms. Riley's death and that gang violence may
33 have played a part in her death.

34 4.12 Prior to applying for the warrant, Detective Decker began looking
35 at social media relating to the homicide case. She looked at social media posts of
36 a Somalian music group ("Group A") that law enforcement suspected had gang
37 involvement possibly tied to Ms. Riley's death. She asked a federal agent familiar
38 with Group A if he had ever heard of Gizachew Wondie. The agent indicated he
39 had never heard the name. Detective Decker also received an organizational chart
40 of Group A from SPD. Mr. Wondie was not on the organizational chart. Three
41 different SPD officers indicated they did not know of any association between

1 Mr. Wondie and Group A. There was no evidence of a connection between Mr.
2 Wondie and Group A. Detective Decker presented information in her affidavit
3 that Group A was potentially associated with the murder of Ms. Riley.

4 4.13 Detective Decker concluded that Mr. Wondie was pictured in a
5 Group A social media post from September 29, 2018 "holding what appears to be
6 a semi-automatic firearm." Detective Decker had access to multiple photos of
7 Mr. Wondie. Based on her individual review of these photos, and a comparison
8 with a photo from a Group A social media post, she identified a person in the
9 Group A photo as Mr. Wondie. She submitted the photo with her affidavit.

10 4.14 Detective Decker testified at the motion hearing that witnesses are
11 less accurate at identifying people of a different race than their own. She also
12 testified that she had access to a gang identification database known as GETEM
13 which she could have sent a blast out to asking if Mr. Wondie was the person
14 pictured in the Group A picture. She did not use the resource.

15 4.15 A defense investigator for Mr. Wondie reviewed the photo found
16 in the Group A post and concluded within 90 minutes of research the person
17 pictured in the Group A photo was 100 percent not Mr. Wondie and instead 100%
18 another individual he had identified from other social media and news
19 publications.

20 4.16 In her affidavit, Detective Decker asserted that Mr. Wondie was
21 the same person pictured in the Group A photo holding a semi-automatic firearm
22 based on her own identification process.

23 4.17 In her affidavit, Detective Decker indicated Mr. Wondie had a
24 propensity for violence.

25 4.18 During her testimony at the Motion hearing, Detective Decker was
26 unable to present any factual basis to support this allegation or to reconcile her
27 assertion with her previous assertion made in the request for SWAT that she did
not believe Mr. Wondie was violent.

28 Neither Detective Decker nor Detective Alvarez were disciplined for their
29 involvement in Mr. Wondie's case. *Fiorito Declaration*, Ex. A.

30 **III. ISSUES PRESENTED**

31 1. The Court should deny Defendant's Motion to Dismiss Mr. Wondie's
32 *Monell* claim.

2. If the Court dismisses Mr. Wondie's *Monell* claim, it should it dismiss without prejudice and grant Mr. Wondie leave to amend the Complaint.

IV. EVIDENCE RELIED UPON

Plaintiff relies upon the pleadings and files already on record, and the Declaration of Dan N. Fiorito III and supporting exhibits.,

V. ARGUMENT AND AUTHORITIES

A. The court should deny Defendant's Motion to Dismiss because Mr. Wondie's Complaint sufficiently alleges facts from which to infer municipal liability under Monell.

In response to Defendant's Rule 12(c) motion, Mr. Wondie has met his obligation to provide the grounds of his entitlement to relief because he has provided more than labels and conclusions. Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact). *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). Thus, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." See *Twombly*, 550 U.S. at 570, 127 S.Ct. 1955; see also *Weber v. Department of Veterans Affairs*, 521 F.3d 1061, 1065 (9th Cir.2008). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court draw the reasonable inference that the defendant is liable for

1 the misconduct alleged.” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949, 556 U.S. 662,
2 678 (U.S., 2009)

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4 When evaluating a Complaint to determine the presence of a plausible claim
5 for relief, the reviewing court must engage in a context specific task and on its
6 judicial experience and common sense. But where the well-pleaded facts do not
7 permit the court to infer more than the mere possibility of misconduct, the
8 complaint has alleged—but it has not shown—that the pleader is entitled to relief.
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10 *Id.* at 1949–50. “In sum, for a complaint to survive a motion to dismiss, the
11 nonconclusory ‘factual content,’ and reasonable inferences from that content, must
12 be plausibly suggestive of a claim entitling the plaintiff to relief.” *Moss v. United*
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14 *States Secret Serv.*, 572 F.3d 962 (9th Cir.2009).

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16 Under Federal Rule of Evidence 201, a court may take judicial notice of
17 “matters of public record.” *Id.* at 688-89 (quoting *Mack v. South Bay Beer Distrib.*,
18 798 F.2d 1279, 1282 (9th Cir. 1986)). Specifically, a court may take judicial notice
19 of a fact “not subject to reasonable dispute” because the fact “can be accurately and
20 readily determined from sources whose accuracy cannot reasonably be
21 questioned.” Fed. R. Evid. 201(b)(2).
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24 *Monell* liability against a municipality may be premised on: (1) conduct
25 pursuant to an expressly adopted official policy; (2) a longstanding practice or
26 custom which constitutes the ‘standard operating procedure’ of the local
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1 government entity; (3) a decision of a decision-making official who was, as a matter
2 of state law, a final policymaking authority whose edicts or acts may fairly be said
3 to represent official policy in the area of decision; or (4) an official with final
4 policymaking authority either delegating that authority to, or ratifying the decision
5 of, a subordinate. *See Price v. Sery*, 513 F.3d 962, 966 (9th Cir.2008); *Lytle v.*
6 *Carl*, 382 F.3d 978, 982 (9th Cir.2004); *Ulrich*, 308 F.3d at 984–85; *Trevino v.*
7 *Gates*, 99 F.3d 911, 918 (9th Cir.1996).

8 A “policy” is a “deliberate choice to follow a course of action ... made from
9 among various alternatives by the official or officials responsible for establishing
10 final policy with respect to the subject matter in question.” *Fogel v. Collins*, 531
11 F.3d 824, 834 (9th Cir.2008); *Long*, 442 F.3d at 1185. A “custom” for purposes of
12 municipal liability is a “widespread practice that, although not authorized by
13 written law or express municipal policy, is so permanent and well-settled as to
14 constitute a custom or usage with the force of law.” *St. Louis v. Praprotnik*, 485
15 U.S. 112, 127, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988); *Los Angeles Police Protective*
16 *League v. Gates*, 907 F.2d 879, 890 (9th Cir.1990); *see also Bouman v. Block*, 940
17 F.2d 1211, 1231–32 (9th Cir.1991). Stated differently, a custom is a widespread
18 and longstanding practice that “constitutes the standard operating procedure of the
19 local government entity.” *Trevino*, 99 F.3d at 918; *Gillette v. Delmore*, 979 F.2d
20 1342, 1346–47 (9th Cir.1992). “Liability for improper custom may not be
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1 predicated on isolated or sporadic incidents; it must be founded upon practices of
2 sufficient duration, frequency and consistency that the conduct has become a
3 traditional method of carrying out policy.” *Trevino*, 99 F.3d at 918; *see also*
4 *McDade v. West*, 223 F.3d 1135, 1141 (9th Cir.2000); *Thompson v. Los Angeles*,
5 885 F.2d 1439, 1443–44 (9th Cir.1989). After proving one of the above methods
6 of liability, the plaintiff must show that the challenged municipal conduct was both
7 the cause in fact and the proximate cause of the constitutional deprivation. *See*
8 *Harper v. City of Los Angeles*, 533 F.3d 1010, 1026 (9th Cir.2008); *Trevino*, 99
9 F.3d at 918.

13 Additionally, a municipality's failure to train its employees may create §
14 1983 liability where the “failure to train amounts to deliberate indifference to the
15 rights of persons with whom the [employees] come into contact.” *City of Canton*
16 *v. Harris*, 489 U.S. 378, 388, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989); *Long*, 442
17 F.3d at 1186; *Lee v. City of Los Angeles*, 250 F.3d 668, 681 (9th Cir.2001). “The
18 issue is whether the training program is adequate and, if it is not, whether such
19 inadequate training can justifiably be said to represent municipal policy.” *Long*,
20 442 F.3d at 1186. A plaintiff alleging a failure to train claim must show: (1) he was
21 deprived of a constitutional right, (2) the municipality had a training policy that
22 “amounts to deliberate indifference to the [constitutional] rights of the persons' with
23 whom [its police officers] are likely to come into contact;” and (3) his constitutional
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1 injury would have been avoided had the municipality properly trained those
2 officers. *Blankenhorn v. City of Orange*, 485 F.3d 463, 484 (9th Cir.2007); *Lee*,
3 250 F.3d at 681. “Only where a municipality’s failure to train its employees in a
4 relevant respect evidences a ‘deliberate indifference’ to the rights of its inhabitants
5 can such a shortcoming be properly thought of as a city ‘policy or custom’ that is
6 actionable under § 1983.” *City of Canton*, 489 U.S. at 389, 109 S.Ct. 1197; *Long*
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8 *v. City & County of Honolulu*, 511 F.3d 901, 907 (9th Cir.2007).

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10 A municipality is “deliberately indifferent” when the need for more or
11 different action, “is so obvious, and the inadequacy [of the current procedure] so
12 likely to result in the violation of constitutional rights, that the policymakers ... can
13 reasonably be said to have been deliberately indifferent to the need.” *City of*
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15 *Canton*, 489 U.S. at 390, 109 S.Ct. 1197; *Lee*, 250 F.3d at 682. A “pattern of
16 tortious conduct,” despite the existence of a training program, or “highly
17 predictable” constitutional violations due to a “failure to equip law enforcement
18 officers with specific tools to handle recurring situations,” are circumstances in
19 which liability for failure to train may be imposed. *See Board of County Comm’rs*
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21 *v. Brown*, 520 U.S. 397, 407–10, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997); *Long*,
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23 442 F.3d at 1186–87.

1 1. *Detective Decker's decision to submit a search warrant that*
2 *presented factually incorrect information or omitted exculpatory*
3 *evidence is a custom accepted by King County for its' detectives.*

4 In the present case, King County Detective Kathleen Decker testified under
5 oath that she knew that she needed to submit her NIBIN lead to the WSP Lab for
6 verification to use the evidence, but indicated she thought that requirement only
7 applied to cases going to trial. In her affidavit supporting the search warrant,
8 Detective Decker testified that "the test results link conclusively the shell casings
9 collected from the Amarah Riley murder scene on September 19, 2018 and the
10 Gizachew Wondie Smith and Wesson .40 caliber firearm described above."
11 Detective Decker also testified in her affidavit that "Forensic examination has
12 established that shell casings recovered from the scene matched a gun known to be
13 owned by Gizachew Wondie." At the motion hearing, Detective Decker
14 acknowledged this statement was incorrect.

15 It is undisputable that Detective Decker misrepresented the evidentiary value
16 of the NIBIN query in her affidavit and used it inappropriately. This was the
17 primary evidence Detective Decker used to link Mr. Wondie to the gun she believed
18 was associated with Ms. Riley's murder. Detective Decker testified she thought
19 that NIBIN leads only needed to be verified by the WSP lab if the case was going
20 to trial. In other words, she felt it was perfectly acceptable to knowingly present
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1 inaccurate information (conclusive ballistics match) to a judge to get a warrant.²

2 Furthermore, Detective Decker portrayed Mr. Wondie as a violent African

3 American gang member when she had no such evidence to support the inference.

5 Detective Decker misrepresented facts to the Court to obtain a warrant.

6 Detective Decker was not subjected to discipline for her actions giving rise to the

7 ratification of her actions by the Defendant. Thus, even based on the Complaint,

9 genuine issues of material fact as to: (1) whether Defendant had a custom

10 surrounding detectives' accepted use of judicial deception that was so settled as to

11 have the force of law; (2) whether the Defendant's training regimen and practices

13 gave rise to culture that encouraged, permitted, or acquiesced to detectives' use of

14 judicial deception; and (3) whether the Sheriff's alleged failure to discipline rose

16 to the level of ratification. It is entirely reasonable to infer that King County failed

17 to train Detective Decker and other detectives regarding the Fourth Amendment

18 and that other detectives mislead judges in search warrant affidavits through

19 judicial deception with approval from the Defendant.

25 ² After Mr. Wondie's successful *Franks* Motion at his criminal trial, the Court found that
26 Detective Decker recklessly provided false information and omitted information from the
affidavit that resulted in misleading information being communicated to Judge Richardson.
Fiorito Declaration, Ex. B. Mr. Wondie asks the Court to take judicial notice of the Court's
27 Order.

1 2. *Defendant is aware that other detectives have engaged in judicial*
2 *deception.*

3 Evidence exists within the public domain that King County Sheriff's⁴
4 Detectives have been accused of making false statements and omitting information⁵
5 in search warrant affidavits in pursuit of a homicide investigation. For example, in⁶
6 *Wheeler v. Broggi*, et al., C19-1410-JCC-MAT, the Plaintiff, a black male, alleged⁷
7 municipal liability because King County Sheriff Detectives made false statements⁸
8 and omitted important facts from a search warrant affidavit that would have⁹
9 undermined the murder allegations against him. Magistrate Judge Theiler found¹⁰
10 there was evidence the detectives filed misleading or incomplete sworn statements¹¹
11 to obtain a warrant. Magistrate Judge also found that while plaintiff "provides¹²
12 minimal information regarding the allegation of municipal liability through a¹³
13 theory of ratification," there was enough evidence of municipal liability to¹⁴
14 recommend denial of the defendant's motion. *Fiorito Declaration, Ex. C.*, p. 24.¹⁵
15 In the alternative, she recommended dismissal without prejudice and with leave to¹⁶
16 file an amended complaint. *Id.*¹⁷

22 Mr. Wondie asks that the Court take judicial notice of *Wheeler v. Broggi* and
23 the allegations made against King County detectives Eleanor Broggi and Matthew
24 Olmstead as evidence that judicial deception is a custom accepted within King
25 County. The fact that detectives Decker, Broggi, and Olmstead were not
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1 disciplined for their deception is further evidence that such behavior is tolerated
2 and accepted by King County as customary. Also, the fact that multiple King
3 County detectives have purportedly engaged in judicial deception is evidence that
4 the Defendant has failed to train its homicide detectives regarding the Fourth
5 Amendment. Such failure to train amounts to deliberate indifference to the rights
6 of persons with whom the detectives come into contact, particularly when the result
7 of such indifference is incarceration of indigent persons of color.

10 Defendant alleges in its motion “nowhere does Wondie allege facts giving
11 rise to the plausible inference that the County’s existing training and supervisory
12 programs are deficient.” Clearly, this assertion fails, especially when viewed in
13 relation to Defendant’s failure to discipline Detective Decker after she clearly
14 violated Mr. Wondie’s constitutional rights and in light of similar claims made
15 against other detectives that were settled by Defendant in *Wheeler v. Broggi*.³
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18 **B. If the Court dismisses, the dismissal should be without prejudice
19 and with leave to amend.**

20 If a Rule 12 motion to dismiss is granted, “[the] district court should grant
21 leave to amend even if no request to amend the pleading was made, unless it
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³ King County agreed to pay \$500,000.00 to settle all claims brought by Mr. Wheeler against
26 Detectives Broggi and Olmstead. Mr. Wondie asks this Court to take judicial notice of this
27 settlement as it was widely reported in the press. King County has been aware of at least three
detectives alleged to have engaged in judicial deception against persons of color. *Fiorito
Declaration, Ex. D.*

determines that the pleading could not possibly be cured by the allegation of other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir.2000) (en banc). In the present case, discovery is ongoing. If the Court dismisses the *Monell* claim, it should do so without prejudice and grant leave to Mr. Wondie to amend his Complaint.

VI. CONCLUSION

Mr. Wondie's Complaint alleges facts sufficient to establish Detective Decker acquired a warrant against Mr. Wondie through judicial deception. In fact, the criminal court made this determination. Detective Decker was not disciplined for her conduct demonstrating that King County ratified her action and failed to train her, thus establishing a factual basis to support Mr. Wondie's municipal claim. Also, public records demonstrate at least two other King County detectives have sought warrants through judicial deception against indigent people of color, raising the inference that King County is liable under the custom or policy components of *Monell*. Thus, the Defendant's motion to dismiss the *Monell* claim must be denied. In the alternative, the Court should dismiss the *Monell* claim without prejudice and allow Mr. Wondie leave to amend the Complaint.

Respectfully submitted this 20th day of June 2022.

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on June 20, 2022 I electronically filed the foregoing with
3 the Clerk of the Court using the CM/ECF system which will send notification of
4 such filing to all counsel of record.

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6 Dated this 20th day of June, 2022.

7 */s/ Dan Fiorito*

8 Dan Fiorito, WSBA No. 34009

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